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No. 93-248

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHARON JOHNSON,
Petitioner,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. In its opposition to the Petition, the government effectively concedes that the decision below was erroneous. Opp. 10 n.5. In light of this concession, this Court should grant the Petition, vacate the decision below, and remand the case for further proceedings. *See Mariscal* v. *United States*,

449 U.S. 405 (1981); *DeMarco* v. *United States*, 415 U.S. 449 (1974).

Before the Fourth Circuit, the government argued that "[i]n order to be constructively discharged, an employee must have resigned in direct response to an employer who is deliberately pressuring her to leave her job." Brief of Appellant/Cross Appellee, at 17. In other words, "there must be proof of the employer's specific intent to force the employee to leave" in order to establish a constructive discharge. Brief of Appellant/Cross Appellee, at 19.

The Fourth Circuit's holding on the liability issue rests squarely on the deliberate intent requirement proposed by the government: "[W]e find no evidence that NIH intended to force Johnson to resign, and accordingly we reverse the judgment of the district court." Pet. App. 2a. Under the Fourth Circuit's holding, in order to establish a constructive discharge, an employee must show not only the existence of intolerable working conditions, but also the existence of a deliberate intent on the part of the employer to force the employee to quit.[1/] Pet. App. 10a-11a.

[1/] Contrary to the suggestion of the government, Opp. 10 n.5, Petitioner did not argue below, nor did the district court hold, that an employee may establish a constructive discharge based solely on being denied reasonable accommodation of a known disability. *See* Pet. 10 n.8; Pet. App. 37a-38a. Instead, Petitioner argued below, and the district court held, that a claim of constructive discharge may follow from an employer's failure to provide reasonable accomodation when such a failure results in intolerable working conditions. Pet. 8, 10 & 10 n.8. The trial court so held, and the government did not appeal below the district court's findings that NIH failed to offer reasonable accommodation and that this failure created intolerable working conditions.

The government has now completely abandoned its prior position as to the need for evidence of specific intent, which also formed the essential underpinning of the Fourth Circuit's decision. The government explains that "[t]he Fourth Circuit's decision and the position that the government took below on the issue of intent have been the subject of broad consultation within the Executive Branch." Opp. 10 n.5. "As a result of this consultation, the government no longer takes the position that a finding of intent to force an employee to leave is required in order to support a conclusion of constructive discharge." *Id.*[2/] In light of these circumstances, the Court should construe the government's opposition as a confession of error.

In similar circumstances, this Court has treated a decision by the Solicitor General not to defend the position that the government argued below as a tacit confession of error, granted the petition for certiorari, and entered a per curiam judgment in favor of the petitioner. *See DeMarco* v. *United States*, 415 U.S. 449, 449-50 (1974); *see also Mariscal* v. *United States*, 449 U.S. 405-06 (1981) (granting petition for certiorari and vacating decision below based on "concession" by the Solicitor General). In *DeMarco*, the Solicitor General "filed a response [to a petition for certiorari] which, though entitled 'Memorandum in Opposition,' incorporates in a footnote a backhanded invitation to the Court to follow the course which it has now taken [i.e., granting the petition and summarily reversing the decision of the Court of Appeals]." *Id.* at 451 (Rehnquist, J., dissenting). There is no

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[2/] The government also states that "the Fourth Circuit's decision would be erroneous if read as . . . holding that, to establish [a constructive discharge] claim, a plaintiff must prove that her employer intended to force her to quit." Opp. 10. That is, however, exactly what the Fourth Circuit held (*see* Pet. App. 2a, 10a-11a), and thus the government is expressly repudiating the holding below.

material distinction between *DeMarco* and this case; the Court should therefore construe the government's opposition as a confession of error.

The government is plainly unwilling to defend the Fourth Circuit's holding. Its opposition does not present any alternative legal basis for affirming the Fourth Circuit's decision. In these circumstances, the most appropriate course of action is for the Court to reverse summarily the decision below and remand the case to the Fourth Circuit for further proceedings in light of the government's change of position. *See, e.g., DeMarco*, 415 U.S. at 450.

2. As set forth in the Petition, there currently exists a split among the Circuits on the correct standard for establishing a constructive discharge. Pet. 4-8. The government concedes that this split exists. It also acknowledges that the legal question presented in this case is such an important one that it has "been the subject of broad consultation within the Executive Branch." Opp. 10 & 10 n.5. Nevertheless, the government offers three reasons for denying the Petition. As explained below, none of these reasons has merit.

a. The government urges the Court to deny the Petition because this case involves the Rehabilitation Act, whereas the conflicting constructive discharge decisions from other Circuits involve Title VII or other employment discrimination statutes. Opp. 11-13. But the government expressly concedes, despite the Fourth Circuit's suggestion to the contrary, Pet. App. 9a, that the standard for constructive discharge should not vary depending on the employment

statute that is at issue,[3/] Opp. 10, 13, and it is clear that the same standard for establishing the existence of a constructive discharge applies under the Rehabilitation Act as under other employment statutes. *See Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3rd Cir. 1992); *see also Goss* v. *Exxon* Office Sys. Co., 747 F.2d 885, 887 (3rd Cir. 1984) (describing how the constructive discharge doctrine originated in federal labor law and listing cases that apply the constructive discharge doctrine across various civil rights statutes). The fact that the present case arises under the Rehabilitation Act rather than Title VII or some other employment discrimination statute does not affect the basic legal question, which is whether a plaintiff in proving a constructive discharge must establish that the employer had the deliberate intent of forcing the employee to resign.[4/]

b. The government also argues that, to the extent the Fourth Circuit has applied an incorrect standard for proving a constructive discharge, the problem will be self-correcting "and may well abate without the need for review by this Court." Opp. 13-14. In support of this position, the government cites the Eighth Circuit's recent decision in *Hukkanen* v. *International Union of Operating Engineers Local No. 101*, 3 F.3d 281 (8th Cir. 1993). Opp. 14-15. To

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[3/] Indeed, the government itself cites cases arising under Title VII to support some of its arguments, including its argument that the Circuits will ultimately resolve the proper standard for establishing a constructive discharge. *See* Opp. 13-17.

[4/] Because the Fourth Circuit did not find any of the district court's factual determinations to be "clearly erroneous," one must conclude that its holding rests on its interpretation of the law, rather than on the specific facts of the case. *See generally Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Thus, the Fourth Circuit's holding is not limited to the facts of the case.

be sure, subsequent to the filing of the Petition the Eighth Circuit has made clear that a plaintiff in that Circuit can establish a constructive discharge without showing that the employer harbored a conscious intention to force a resignation, calling an argument for such a requirement a "bizarre contention." *Hukkanen*, 3 F.3d at 284-85. Yet, this "bizarre contention" is now the law of the Fourth Circuit. Pet. App. 2a, 10a-11a. There is no basis for assuming that the Fourth Circuit will abandon its holding in this case or will soon, if ever, adopt a position more in conformity with the position now espoused by the government and by certain other circuits.[5/]

Contrary to the government's assertion, *Hukkanen* and cases like it demonstrate the level of confusion that presently exists in the circuits. There is a strong need for this Court to provide the Circuits with clear guidance on the standards for establishing a constructive discharge.

c. Finally, the government argues that "this case is a poor factual vehicle" for review of the constructive discharge doctrine because there was supposedly only "weak" evidence supporting the district court's finding of intolerable working conditions. Opp. 18-20. But the government did not appeal the district court's finding of intolerable working conditions (which would have required it to show that the finding was clearly erroneous), and it is clearly too late for it now to challenge that finding. At this stage, the Court is required to assume that the district court's finding that Dr. Johnson was

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[5/] Moreover, contrary to the Eighth Circuit's decision which was reached by a panel, the Fourth Circuit adopted the requirement that intent be shown to establish a constructive discharge claim after an en banc determination. *See Paroline* v. *Unisys Corp.*, 900 F.2d 27, 28 (4th Cir. 1990) (en banc); *see also Paroline* v. *Unisys Corp.*, 879 F.2d 100, 113-14 (4th Cir. 1989) (Wilkinson, J., dissenting) (adopted by en banc court).

subjected to intolerable working conditions was adequately supported in the record. *See Maine* v. *Taylor*, 477 U.S. 131, 145 (1986); *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 283-84 (1978); *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

CONCLUSION

For the foregoing reasons, the Petition should be granted, the decision below should be summarily reversed, and the case remanded for further proceedings.

Respectfully submitted,

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